

BEFORE THE MANAWATU-WANGANUI REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER hearing of submissions to the Proposed 'One Plan' - Living Heritage Section:
INDIGENOUS BIODIVERSITY

**STATEMENT OF EVIDENCE
BY
DAVID FORREST**

INTRODUCTION

1. My name is David James Forrest and I reside in Palmerston North. I am the Planner Principal of Good Earth Matters Consulting Limited, an environmental engineering, asset management, planning and resource management consultancy practice based in Palmerston North.
2. I hold the degrees of Bachelor of Arts (Hons) and Master of Science (Resource Management) and I am a full member of the New Zealand Planning Institute.
3. I have been engaged in planning and resource management practice for almost 30 years. In particular, I have been involved in the provision of planning and resource management advice for the preparation and administration of a number of District Plans in both the North and South Islands.
4. I have been requested by a Territorial Authority (TA) Collective (comprising the Horowhenua, Wanganui, Rangitikei, Ruapehu, Manawatu and Tararua District Councils) to prepare evidence in relation to common TA submissions to various aspects of the Proposed One Plan (POP).
5. I confirm that I have read and am familiar with the Code of Conduct for Expert Witnesses in the Environment Court Consolidated Practice Note (2006). I have approached the preparation of this evidence in the same way that I would for the Environment Court. I agree to comply with the Code of Conduct.
6. The evidence to follow covers the following matters:
 - Part I (RPS) Chapter 7 - 'Living Heritage' Policy 7:1 Responsibilities for Maintaining Indigenous Biological Diversity
 - Part II (Regional Plan) Chapter 12 - Rule 12.8

PART I (RPS) CHAPTER 7 – POLICY 7-1: RESPONSIBILITIES FOR MAINTAINING INDIGENOUS BIOLOGICAL DIVERSITY

7. The Proposed One Plan (POP) states (Section 1.3, page 1-4) that *"Horizons will be the lead agency for biodiversity management for the Region by controlling activities in rare and threatened habitats, at risk habitats and working with land owners to protect and enhance these habitats"*.
8. In principle, this approach is supported, given the range of functions carried out by the Regional Council in relation to indigenous biodiversity. My concern, and that of the Territorial Authorities (TAs) and in particular the TA planners, is that it is essential that **"who does what"** is made clear in the One Plan so that there is no overlap of functions between the Regional Council and the TAs and that the functions are carried out as efficiently and effectively as possible.
9. Policy 7-1 of the POP (page 7-5) sets out the respective responsibilities of the Regional Council and the Territorial Authorities in respect of maintaining indigenous biological diversity. **Policy 7-1** states as follows:

"Policy 7-1: Responsibilities for maintaining indigenous biological diversity

In accordance with s 62(1)(i) RMA, local authority responsibilities for controlling land use activities for the purpose of maintaining indigenous biological diversity in the Manawatu-Wanganui Region are apportioned as follows:

(a) The Regional Council shall be responsible for:

- (i) developing objectives, policies and methods for the purpose of establishing a region-wide approach for maintaining indigenous biological diversity*
- (ii) developing rules controlling land use activities for the purpose of maintaining biological diversity.*

(b) Territorial Authorities shall be responsible for:

- (i) implementing the objectives and policies of this chapter when developing rules and making decisions on subdivisions and land-use consent applications.*
- (ii) retaining schedules of notable trees and amenity trees in their district plans and/or such other measures as they see fit for the purpose of recognising amenity and cultural values associated with indigenous biological diversity."*

10. Of particular concern, as will be explained, are Policy 7-1(a)(ii) and 7-1(b)(i). For district planners in particular, it is essential that the RPS provides clear direction as to the functions to be carried out by the Regional Council and those that are to be carried out by the Territorial Authorities. Given the TA's primary functions in respect of land use and subdivision, the district planners do not wish to see either an overlap of functions or unnecessary duplication of effort in terms of administering provisions pertaining to indigenous biological diversity.
11. For most TAs, indigenous biological diversity, and in particular the conservation and protection of indigenous vegetation, remains a particularly difficult aspect of resource management. For example, Tararua District's first District Plan prepared under the Resource Management Act 1991 was subject to only three references to the Environment Court. The most significant matter, the only one to proceed to be considered by the Court, was that pertaining to indigenous vegetation. Rather than proceed directly to a hearing before the Environment Court, it was

agreed amongst the parties, namely Department of Conservation (which filed the reference), Federated Farmers and the Tararua District Council, that an attempt be made to negotiate and/or mediate the matter with a view to settling it by way of a consent order. It took almost nine months of negotiation between the parties before an interim set of indigenous vegetation protection measures (rules) were included in Tararua's District Plan by way of a consent order issued by the Environment Court. The reason for raising this example is that it indicates to me that if the functions and responsibilities between the Regional Council and the TAs are not clear and unequivocal, the district planners risk having to face ongoing difficulties of application and administration of the provisions, not the least of which is having to explain such difficulties and uncertainties to land users in the respective districts.

12. On page 38 of Ms Marr's Section 42A Officer's Report, she makes the statement that "*Because of the level of expertise, involvement and funding HRC has to put into maintaining biodiversity, it is also considered that HRC is the best placed agency to introduce, process, monitor and enforce rules controlling land use to maintain biodiversity*". Whilst I accept this statement in principle, I do have two concerns arising from it which require further consideration.
13. One concern is the reference, in several places in Ms Marr's Report to the Regional Council being the lead council agency (see the first sentence in the second paragraph of clause 4.6.3 on page 38 of Ms Marr's report) and the reference on page 39 of her report in the second sentence to the fact that "*... HRC would be the only authority with land use rules controlling land for the purpose for maintaining biodiversity*".
14. My first concern is to clarify whether the Regional Council considers it will be the **lead** agency as compared with the **only** (or sole) agency. If the Regional Council is the only authority controlling land for the purpose of maintaining biodiversity, it may be necessary to transfer a function from the TAs to the Regional Council. I shall discuss this further in a moment. Alternatively, if the Regional Council is to be the lead (or primary) authority, it will be necessary to "draw the line" of responsibility to avoid any overlap of jurisdiction.
15. My second concern is focussed on the ability of the Regional Council to include rules in the POP to control land for the purpose of maintaining biodiversity. This issue, prompted a submission from the TAs questioning the vires of this approach, as it does not accord with RMA section 30(1)(ga) and section 31(1)(b)(iii) of the RMA.
16. Mr Maassen, in his Section 42A Report, has recognised the basis of the TA's concerns, namely the ability of the Regional Council to develop rules for controlling land use for the maintenance of indigenous biological diversity in his paragraph 29 on page 8. As Mr Maassen rightly observes (but doesn't support), "*express power to control land use from section 31(1)(c) does not refer to the control of land use for the maintenance of indigenous biological diversity*". Again, as Mr Maassen points out, if that was intended, then Parliament would have made express provision for control of land use for that purpose in section 30(1)(c), or alternatively made reference to methods including rules in section 30(1)(ga). By comparison, the function under the Act for Territorial Authorities in section 31(1)(b)(iii) makes specific provision:

"(b) for the control of any actual or potential effects of the use, development or protection of land, including for the purpose of –

...

(iii) the maintenance of indigenous biological diversity"

17. Thus, if the Regional Council seeks full control over land use for the maintenance of indigenous biological diversity, and there is any doubt as to whether Section 30 and Section 68 allow this to

occur, it may be necessary, in my opinion, to transfer the Section 31(1)(b)(iii) function from the Territorial Authorities to the Regional Council pursuant to Section 33 of the RMA.

18. If this sole responsibility for this function is not assumed by the Regional Council and there is a need to "draw the line" of responsibility, a question arises as to where this line should be drawn.

19. In the first paragraph on page 39 of Ms Marr's report, she states that:

"However I believe that part (b)(i) could be amended to make the role of TAs more clear. TAs are not expected by this policy to write rules in their plan which control land use for the purpose of maintaining biodiversity. However it is acknowledged that TA's write and implement land use rules for other purposes, and they also control subdivision. I think this is particularly relevant for subdivision, when the ownership of significant habitats could become fragmented and the introduction of animals or plants (through domestic pets and gardens) is a very real threat, both of which can be controlled by conditions of subdivision consent. I believe that Policy 7-1(b)(i) should be altered to make this clearer."

20. The first observation that I would make is that this statement appears to be contradictory. On the one hand, Ms Marr is saying the TAs are not expected to write rules in their plan to control land use for the purpose of maintaining biodiversity but on the other is suggesting that rules may be necessary to maintain biodiversity through the use of conditions of subdivision consent.

21. How will "... ownership of significant habitats could become fragmented ..." be controlled by means of conditions of subdivision consent? A condition will not avoid fragmentation. If a subdivision is to take place involving a significant habitat, the submitted plan will show, and be requesting, that the habitat is to be divided into two or more parcels. Assuming the subdivision is a controlled activity, the TA, as consent authority, can only grant consent, not refuse it. A TA can't place a condition of consent that the subdivision plan be withdrawn and resubmitted. Is Ms Marr suggesting that the TAs draft a rule in their District Plans that prevents any significant habitat being subdivided? Or, is she suggesting that their District Plans contain a rule (or rules) such that where a significant habitat is shown as being fragmented (severed in some way) by a subdivision plan submitted with a resource consent application, that it be categorized as, say, a restricted discretionary or discretionary activity so that consent can be refused?

22. Also, how will "... the introduction of animals or plant (through domestic pets and gardens) is a very real threat ..." be controlled by conditions of subdivision consent? The act of delineating and defining parcels of land and assigning property rights (i.e. the process of subdivision) doesn't create a threat per se. It is the subsequent use of the defined parcels that creates the threat. In my experience, I doubt whether a condition could be placed on a subdivision consent to achieve the desired outcome. Even if could lawfully be done, it would be difficult to monitor and enforce. If it could be done, would the monitoring be carried out by Regional Council staff and then enforced by the TAs based on the Regional Council's advice?

23. Ms Marr's suggested amendment to Policy 7-1(b)(i) (on page 40 of her Report) does not provide the certainty, in my opinion, that the TA planners in particular are seeking. Thus, I consider that the first question to be answered is whether sole responsibility for controlling land use for the purpose of maintaining biodiversity is to rest with the Regional Council. The second question to be answered is how will this be achieved to make it lawful (i.e. rely on S30 or transfer the function pursuant to S33?) The third question to be answered (if necessary) is, if the Regional Council is to be the primary (or lead) agency, what (if any) rules or controls in the District Plans

will be necessary to assist to achieve this purpose of maintaining biodiversity? In my opinion, Part I (RPS) of the POP ought to clearly state which aspects of land use management need to be "given effect to" in the District Plans as required by RMA Section 75(3)(c). In my view, Policy 7-1(b)(i) doesn't provide sufficient guidance or direction as to which aspects of biodiversity maintenance require to be subject to District Plan rules.

24. I hasten to add that none of the TAs have considered such a transfer which would need to be undertaken in accordance with Section 33(4) and the special consultative procedure set out in Section 83 of the Local Government Act 2002.

PART II (RP) CHAPTER 12- RULE 12.8

25. Rule 12-8 refers to activities within a "*rare or threatened habitat**". The glossary of the POP, however, contains two definitions namely "*rare and threatened habitat**", and "*threatened habitat**". There is no definition of '*rare habitat**'. Whilst on the surface, this would appear to be a relatively minor matter, it illustrates a more fundamental problem with the POP, namely a lack of attention to the detailed drafting of its provisions, and rules in particular. The difference between an 'or' and an 'and' can be acute, as any experienced district planner will attest. I note that Ms Marr in her report (clause 4.28.3, page 110) acknowledges this problem and recommends that the 'or' be replaced with an 'and', as sought by the TAs. I also note that Ms Marr recommends (clause 4.33.2.1, page 132) that the definition of '*threatened habitat**' be deleted from the glossary of the POP. I support both these recommendations.
26. However, I note that Ms Marr's recommended changes to provisions (in clause 4.28.3.1, pages 110 and 111) require further amendment so that (f) in the 'activity' column (page 111) also reads as "*a rare and threatened habitat**", not "or" as it is presently drafted. I also note the 'classification' should not be "Non- ". Presumably, it is intended to be 'Non-complying'.
27. A second matter of concern in relation to Rule 12-8 of the POP (pages 12-7 and 12-8) pertains to the activity column and exclusion (f), which states
- "This rule does not apply to the activities described in subsections (a) to (d) in circumstances where:*
- ...
- (f) they are carried out for the purposes of protecting or enhancing a rare or [sic] threatened habitat*, or ..."*
28. The question posed by the TAs, in their submissions, was "who decides whether the clearance will improve a patch of bush or not?" What degree of subjectivity is acceptable when determining categories of activity, when the result of a determination could take an activity from being non-complying to 'permitted as of right' under Rule 12-1. Just who assesses and how an assessment is made of "**the purpose** of protecting or enhancing ..." (emphasis added) a rare and threatened habitat*, is not clear. Is it sufficient to rely on someone's intentions re protecting or enhancing? I have not been able to find any comment in Ms Marr's report on this issue but consider it to be a matter requiring clarification.
29. I am available to answer any questions that the Hearing Panel may wish to put to me.

David Forrest

10 July 2008